

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs April 29, 2008

**MICHAEL RALPH BROWN v. DAVID MILLS, WARDEN**

**Direct Appeal from the Criminal Court for Morgan County  
No. 9307 E. Eugene Eblen, Judge**

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**No. E2007-01891-CCA-R3-HC - Filed November 17, 2008**

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Petitioner, Michael Ralph Brown, appeals the trial court's summary dismissal of his petition for writ of habeas corpus in which he alleged that his sentence is illegal and void because he was sentenced as a Range II, multiple offender, instead of a Range I, standard offender. After a thorough review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

Michael Ralph Brown, Wartburg, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; and Russell Johnson, District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

**I. Background**

Petitioner was originally indicted for first degree premeditated murder. On April 22, 2002, Petitioner entered a plea of guilty to the lesser included offense of second degree murder and agreed to be sentenced as a Range II, multiple offender. The trial court imposed the agreed upon sentence of thirty years. Petitioner filed his first pro se petition for writ of habeas corpus relief on March 24, 2007, which the trial court dismissed for failure to comply with procedural requirements.

In his second pro se habeas corpus petition, Petitioner argued that his sentence is illegal and void because he should have been sentenced as a Range I, standard offender. Petitioner contended that the State did not provide notice of its intention to seek enhanced punishment as required by statute, and insisted that he did not agree to be sentenced as a Range II, multiple offender. Petitioner

also contended that he did not agree to a release eligibility of one hundred percent as a violent offender.

The State filed a motion to dismiss the habeas corpus petition because the petition did not state a cognizable claim for habeas corpus relief, and the trial court granted the State's motion without the appointment of counsel and without an evidentiary hearing. On appeal, Petitioner argues that the trial court erred in summarily dismissing his habeas corpus petition.

## **II. Standard of Review**

The right to habeas corpus relief is available “only when ‘it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered’ that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired.” Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007) (quoting Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993)). In contrast to a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. Summers, 212 S.W.3d at 255-56. A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity. Id. at 256; Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). A void judgment “is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment.” Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); Dykes, 978 S.W.2d at 529.

A petitioner bears the burden of proving a void judgment or illegal confinement by a preponderance of the evidence. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). A trial court may summarily dismiss a petition for writ of habeas corpus without the appointment of counsel and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the conviction addressed therein is void. See Summers, 212 S.W.3d at 259-60; Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

The determination of whether habeas corpus relief should be granted is a question of law. Summers, 212 S.W.3d at 255; Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000). Therefore, our review is de novo with no presumption of correctness given to the findings and conclusions of the lower court. Summers, 212 S.W.3d at 255; State v. Livingston, 197 S.W.3d 710, 712 (Tenn. 2006).

## **III. Analysis**

### **A. Untimely Appeal**

The State initially argues that Petitioner's appeal of the trial court's dismissal of his habeas corpus petition is untimely. Pursuant to Tennessee Rule of Appellate Procedure 3(b), a petitioner may appeal as of right from the final judgment of the habeas corpus proceeding. The notice of appeal shall be filed within thirty days after the date of entry of the judgment. Tenn. R. App. P. 4(a).

Rule 4(a) further provides, however, that in all criminal cases the notice of appeal is not jurisdictional and may be waived “in the interest of justice.”

The trial court entered its order dismissing Petitioner’s petition for habeas corpus relief on May 22, 2007. On June 4, 2007, Petitioner filed a “motion for reconsideration or in the alternative, Petitioner’s notice of appeal.” In his motion to reconsider, Petitioner asked for reconsideration based on his motion responding to the State’s motion to dismiss which was filed on May 21, 2007. Alternatively, Petitioner requested the trial court “to forward its record to the Court of Appeals [sic] if it elects not to reverse its May 22, 2007 order.” On November 14, 2007, the trial court denied Petitioner’s motion for reconsideration and directed that “the clerk should treat the pleading as a notice of appeal.”

The State correctly argues in its brief that a motion for reconsideration is not one of the motions that tolls the time for filing a notice of appeal. State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992); State v. Robert William Rockwell, No. E2006-01717-CCA-R3-CD, 2007 WL 2297817 (Tenn. Crim. App. Aug. 13, 2007), no perm. to appeal filed. However, in determining whether a waiver of the thirty-day notice requirement is appropriate, this Court shall consider the nature of the issues for review, the reasons for the delay in seeking relief, and other relevant factors presented in each case. It is apparent that the trial court and Petitioner considered Petitioner’s motion to reconsider to include a notice of appeal, and that the notice of appeal was thus considered to have been filed within thirty days of the trial court’s order dismissing Petitioner’s habeas corpus petition. Based on our review of all of the circumstances, we will waive the timely filing of the notice of appeal and address Petitioner’s issues on the merits.

## B. Sentencing Issues

If the State wishes to seek enhanced punishment, it is required to file a statement of such intent at least ten days prior to trial or the acceptance of a guilty plea. T.C.A. § 40-35-202; Tenn. R. Crim. P. 12.3. Petitioner argues that the State failed to give the requisite notice of enhanced punishment, and that his sentence as a Range II, multiple offender, is thus illegal and void. The State points to the transcript of the guilty plea submission hearing in which the prosecutor stated that the State had filed a notice of intent to seek enhanced punishment based on Petitioner’s prior two convictions for aggravated sexual battery, a Class B felony, and that, as part of the negotiated plea agreement, Petitioner agreed to be sentenced as a Range II, multiple offender. See T.C.A. § 40-35-106(a)(1) (providing that a “multiple offender” is a defendant who has received a minimum of two but not more than four prior felony convictions within the conviction class, a higher class, or within the next two lower felony classes).

The record does not contain the State’s notice to seek enhanced punishment. Nonetheless, even assuming arguendo that no notice was filed, Petitioner would not be entitled to habeas corpus relief. In the context of a plea negotiation, this Court has previously held that the “mere failure to file a statement [of intent to seek enhanced punishment] under the statute prior to the plea of guilty does not vitiate the plea, where the record shows the appellant was aware of the intent of the state

to ask for enhanced punishment and where he bargained on that basis.” Crump v. State, 672 S.W.2d 226, 227 (Tenn. Crim. App. 1984); see also Livingston, 197 S.W.3d at 714 n.3 (Tenn. 2006), citing Brooks v. State, 756 S.W.2d 288, 291 (Tenn. Crim. App. 1988) (acknowledging that this Court has previously held in the post-conviction forum that “although a petitioner was not given prior written notice that the State would seek to enhance his punishment, the fact that he had actual knowledge that he would receive a Range II sentence, and that he agreed to such sentence as part of a plea bargain agreement meant that he could not later complain on appeal that the recidivist penalty was void for lack of notice”).

Petitioner’s plea of guilty clearly states that he voluntarily pled guilty to the offense of “second degree murder, Range II offender.” At the guilty plea submission hearing, the trial court asked Petitioner if it was his understanding that he was entering a plea of guilty to second degree murder as a Range II, multiple offender, with a range of punishment between twenty-five and forty years. Petitioner responded, “Yes.” The trial court subsequently asked Petitioner if he had a prior criminal record. The State responded:

Your Honor, we had previously filed notice of intent to seek Range II based on two prior [aggravated sexual battery] convictions that were for Class B felonies that [Petitioner] had and had several sentences on.

Petitioner did not contest the existence of his prior convictions, and the trial court informed Petitioner that he was sentenced to thirty years as a Range II, multiple offender, with a release eligibility of 100 percent. Petitioner did not interject any objection to the trial court’s imposition of sentence, affirmed that he understood the terms of his sentence, and entered his plea of guilty to second degree murder.

Proof of any deficiencies in the State’s notice of enhanced punishment would require extrinsic evidence beyond the face of the record which would render his judgments of conviction potentially voidable rather than void, and thus such allegation is not a cognizable claim for habeas corpus relief. Petitioner’s claim that he did not agree to be sentenced with a release eligibility of 100 percent is likewise not a ground for habeas corpus relief. Allegations relating to the voluntariness of a guilty plea would not render the judgment of conviction void, but merely voidable, and are not cognizable in a habeas corpus proceeding. See Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), superseded by statute as stated in State v. Steven S. Newman, No. 02C01-9707-CC-00266, 1998 WL 104492, at \*1 n. 2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998), no perm. to appeal filed; Luttrell v. State, 644 S.W.2d 408, 409 (Tenn. Crim. App. 1982).

Petitioner does not allege that the trial court was without jurisdiction to sentence him or that his sentences have expired. Because the habeas corpus petition does not state a cognizable claim for habeas corpus relief, we conclude that the trial court did not err in summarily dismissing the petition. Petitioner is not entitled to relief on these issues.

## **CONCLUSION**

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE